

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	98-0194
Implementation of Section 16-127	:	
of the Public Utilities Act	:	

ORDER

By the Commission:

I. PROCEDURAL HISTORY

On March 11, 1998, the Illinois Commerce Commission ("Commission") initiated this docket to develop rules to implement Section 16-127 of the Public Utilities Act ("Act"), 220 ILCS 5/1-101 et seq. Public Act 90-561 added Section 16-127 to the Act. Section 16-127 concerns environmental disclosures to be made to customers by electric utilities and alternative retail electric suppliers ("ARES"). The Section provides:

Sec. 16-127. Environmental disclosure.

(a) Effective January 1, 1998, every electric utility and alternative retail electric supplier shall provide the following information, to the maximum extent practicable, with its bills to its customers on a quarterly basis:

(i) the known sources of electricity supplied, broken-out by percentages, of biomass power, coal-fired power, hydro power, natural gas-fired power, nuclear power, oil-fired power, solar power, wind power and other resources, respectively; and

(ii) a pie-chart which graphically depicts the percentages of the sources of the electricity supplied as set forth in subparagraph (i) of this subsection.

(b) In addition, every electric utility and alternative retail electric supplier shall provide, to the maximum extent practicable, with its bills to its customers on a quarterly basis, a standardized chart in a format to be determined by the Commission in a rule following notice and hearings which provides the amounts of carbon dioxide, nitrous oxides and sulfur dioxide emissions and nuclear waste attributable to the known sources of

electricity supplied as set forth in subparagraph (i) of subsection (a) of this Section.

(c) The electric utilities and alternative retail electric suppliers may provide their customers with such other information as they believe relevant to the information required in subsections (a) and (b) of this Section.

(d) For the purposes of subsection (a) of this Section, "biomass" means dedicated crops grown for energy production and organic wastes.

(e) All of the information provided in subsections (a) and (b) of this Section shall be presented to the Commission for inclusion in its World Wide Web Site.

Petitions to Intervene in this proceeding were filed by: People's Energy Services Corporation; Illinois Power Company ("IP"); Interstate Power Company; South Beloit Water, Gas, and Electric Company; Union Electric Company and Central Illinois Public Service Company (collectively "AmerenUE/CIPS"); MidAmerican Energy Company ("MidAm"); Blackhawk Energy Services; Midcon Corporation; Mt. Carmel Public Utility Company ("Mt. Carmel"); Commonwealth Edison Company ("ComEd"); Central Illinois Light Company ("CILCO"); PG&E Energy Services ("PG&E"); the City of Chicago; the Environmental Law and Policy Center of the Midwest; the Illinois Environmental Council; the American Lung Association of Metropolitan Chicago; the Illinois Attorney General's Office on behalf of the People of the State of Illinois; the Cook County State's Attorney's Office on behalf of the People of Cook County; and the Citizens Utility Board. All of the Petitions to Intervene were granted by the Hearing Examiner. The Environmental Law and Policy Center of the Midwest, the Illinois Environmental Council, the American Lung Association of Metropolitan Chicago, the People of the State of Illinois, the People of Cook County, and the Citizens Utility Board were all represented by the same counsel and are collectively referred to as the Environmental and Consumer Intervenors ("ECI").

Pursuant to proper legal notice, a pre-hearing conference was held in this rulemaking before a duly authorized Hearing Examiner of the Commission at its offices in Springfield, Illinois on April 7, 1998. Thereafter, an evidentiary hearing was held on May 18, 1998. Testimony was presented by the following witnesses: John Stutsman, Director of the Nuclear Policy Program in the Commission's Energy Division, on behalf of Commission Staff ("Staff"); Steven Walter, an employee of the City of Chicago's Department of Environment Energy Office, on behalf of the City of Chicago; Louis DelGeorge, ComEd's Vice President of Environmental, Research and Life Cycle Management, on behalf of ComEd; Mario Teisl, Assistant Professor in the Department of Resource Economics and Policy at the University of Maine, on behalf of ECI; James Seidita, a Financial Analyst for the Environmental Law and Policy Center of the Midwest, on behalf of ECI; Jay Caspary, IP's Director of Customer Choice in the

Customer Solutions Group, on behalf of IP; Robert Thomas, a Senior Environmental Professional in IP's Environmental Resources Department, on behalf of IP; Ray Chalifoux, the Supervisor of Radiological Programs at IP's Clinton Power Station, on behalf of IP; Philip Barnhard, President and Chief Executive Officer of Mt. Carmel, on behalf of Mt. Carmel; Robert Bisha, CILCO's Director of Environmental Services and Compliance: Power Generation Unit, on behalf of CILCO; Cathy Woollums, MidAm's Environmental Services Vice President, on behalf of MidAm; and Peter Bray, PG&E's Manager of California Electric Deregulation, on behalf of PG&E. At the conclusion of this hearing, the record was marked "Heard and Taken."

Initial briefs were filed by Staff, IP, AmerenUE/CIPS, Mt. Carmel, ComEd, CILCO, PG&E, the City of Chicago, and ECI. Reply briefs were filed by Staff, Mt. Carmel, ComEd, CILCO, PG&E, the City of Chicago, and ECI. The Hearing Examiner's Proposed Order was served on the parties. Briefs on Exceptions were filed by Staff, ComEd, CILCO, the City of Chicago, and ECI. Of those that filed Briefs on Exceptions, Staff and CILCO requested adoption of the Hearing Examiner's Proposed Order. Replies to Briefs on Exceptions were filed by Staff, ComEd, CILCO, and ECI. The Briefs on Exceptions and Replies have been considered in preparation of this Order.

II. PRESENTATION OF THE RULE

Prior to the pre-hearing conference, Staff proposed a rule implementing Section 16-127. Since that time, Staff proposed several revised rules after numerous discussions with the intervenors. While a few of the intervenors proposed their own rule, those versions were basically Staff's rule modified as the intervenor deemed appropriate. The rules in the attached Appendix are also derived from Staff's rule. This order will address each section of the rule separately. Those portions of the rule that have been contested in this rulemaking proceeding will be followed by a discussion of Staff's and the respective intervenor's positions.

A. Section 421.10 Applicability

Section 421.10 indicates that 83 Ill. Adm. Code 421 is applicable to all electric utilities and ARES, except those utilities and ARES that provide only transmission and distribution services to customers who purchase their power from another utility or ARES. Although Staff's proposed rule did not contain any exemptions, this exception was added at the urging of CILCO. CILCO witness Robert Bisha testified that a utility that provides only transmission or distribution services to a customer should not be responsible for providing environmental disclosure in the delivery service bill to customers who purchase their power requirements from another utility or ARES. (CILCO Ex. 1.0, p. 3). In those circumstances, according to Mr. Bisha, the party providing the power, not the utility that merely transmits it, should bear the cost and responsibility for the environmental disclosure required by Section 16-127. (*Id.*). Mr. Bisha further testified that in some cases, however, the delivery service utility may bill for the ARES. In such cases, the ARES' compliance with Part 421 should be

addressed in the tariffs which must be approved by the Commission pursuant to Section 16-118(b) of the Act. (*Id.*). AmerenUE/CIPS and ComEd support the inclusion of this exception. (AmerenUE/CIPS Initial Brief, p. 3; ComEd Reply Brief, p. 2).

Only ECI objected to the exception proposed by CILCO. (ECI Initial Brief, p. 12). ECI argues that Section 16-127 is very clear in its requirement that “every” electric utility and ARES shall provide certain environmental information. (*Id.*). ECI, however, ignores the fact that under its interpretation of Section 16-127, customers would receive two environmental disclosure statements, one from the transmitter or distributor of the electricity and one from the utility or ARES that is actually supplying the electricity. If correctly prepared, both disclosure statements would contain the same information. Aside from pointing to the use of the term “every” in the Act, ECI offers no reason why the transmitter or distributor should go to the expense and trouble of obtaining the necessary environmental information from the actual supplier and sending that information to the consumer, who has already received the same information from the actual supplier. Furthermore, receiving two disclosure statements from two different companies may confuse consumers. ECI has asserted at many other points in this proceeding that consumer confusion should be avoided to the extent possible. Requiring consumers to receive two disclosure statements from two different companies is contrary to this proposition.

The Commission also believes that it is reasonable to interpret “every utility and alternative retail electric supplier shall provide . . . (certain information regarding the) . . . sources of electricity supplied . . .” in Section 16-127(a) and (b) to mean that every utility and ARES shall provide the required information with respect to electricity that the utility or ARES itself supplied to the customer receiving the bill. A utility that provided only delivery services to a customer would not have “supplied” electricity to the customer because it merely would have delivered to the customer electricity that had been supplied by another entity. Note, however, that Section 421.10 exempts utilities that provide *only* delivery services. Any utility that supplies any amount of electricity in addition to providing delivery services must also comply with Part 421.

B. Section 421.20 Definitions

With the exceptions of “nuclear waste,” “other resources,” and “unknown resources purchased from other companies,” the parties generally agreed with the definitions provided in Staff’s proposed rules.¹ The Commission, therefore, adopts all other definitions and discusses these three definitions below.

All intervenors except ECI concurred in Staff’s proposed definition of nuclear waste. However, only ComEd objected to the inclusion of “low-level nuclear waste” in

¹ The rule proposed by Staff included a definition of the term “biomass.” The rule in the attached Appendix, however, defines the term “biomass power” in order to maintain consistency with the other definitions of power sources. Since Section 16-127 defines the term “biomass,” the substance of both definitions is the same.

the proposed Order. (ComEd Exceptions pp. 1-9). Staff argues that nuclear waste should be defined as high-level nuclear waste, or fuel that has been removed from a nuclear reactor. (Staff Initial Brief, pp. 9-10). It is the position of Staff that the production of spent nuclear fuel is linked to the production of electricity and is the byproduct of generating electricity just as the combustion process that generates electric power results in the byproducts of carbon dioxide, nitrogen oxides, and sulfur dioxide. Staff asserts that low-level nuclear waste, on the other hand, should not be included within the definition of nuclear waste because it is not always produced as a direct result of and solely during the generation of electricity. Staff further argues that if the Commission decides to include low-level nuclear waste in the rule, it should require the conversion of low-level nuclear waste into equivalent amounts of radioactive material and add it to the quantity of high-level nuclear waste. (Id.)

ComEd concurs with Staff's belief that low-level nuclear waste should not be disclosed because it is allegedly not attributable to the production of energy. (ComEd Exceptions, pp. 2-5). ComEd relies on the judicial canon of statutory construction known as "ejusdem generis." (Id., p. 4). This canon stands for the proposition that where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. According to ComEd, application of this canon requires that "nuclear waste" be tied to the production of electricity, as are all other enumerated waste categories. (Id., p. 5).

ComEd asserts that, in the name of consistency, the proper way to measure low-level nuclear waste is to measure the radioactive materials in the low-level waste rather than the weight or volume of material to which the low-level nuclear waste is attached. (ComEd Initial Brief, pp. 6-7). In other words, rather than measure the weight or volume of a contaminated boot, the weight of the radioactive material on the contaminated boot should be measured. ComEd further argues that because the amount of radioactive material in the low-level waste is many orders of magnitude less than spent nuclear fuel, the difference between the combined spent fuel and low-level waste and the spent nuclear fuel measurement alone is less than any reasonable rounding. (Id.).

ComEd also argues that the statute does not specify a separate line item for low-level nuclear waste. It is ComEd's position that even if low-level radioactive waste were to be included in nuclear waste, the statute does not mandate sub-categories of nuclear waste. (ComEd Initial Brief, pp. 7-8). ComEd asserts that ECI's research does not support the addition of low-level nuclear waste because Dr. Teisl's research did not examine this issue at all. (Id., p. 8). ComEd also asserts that low-level waste is difficult to report consistently. ComEd argues that the amount of low-level waste initially generated will not be the same as the amount shipped for treatment or disposal, regardless of the type of measurement. (Id., pp. 5-6).

IP argues that disclosing low-level nuclear waste would be misleading and counterintuitive because it includes a significant amount of material that does not end up in a waste facility. (IP Initial Brief, p. 2).

ECI argues that the definition of nuclear waste should not be limited to only high-level nuclear waste. In fact, ECI asserts that absent any expressed intention by the General Assembly to limit the term nuclear waste in Section 16-127 to only high-level nuclear waste, there is no legal basis for the Commission to follow Staff's proposal to do so. (ECI Initial Brief, pp. 17-18). ECI states that as a practical matter, high-level and low-level nuclear wastes could be easily stated on two separate lines. ECI asserts that low-level nuclear waste data can easily be obtained from reports that utilities routinely make to the Illinois Department of Nuclear Safety ("IDNS"). (*Id.*).

It is clear the General Assembly could have defined the term "nuclear waste" in Section 16-127 of the Act; however, it did not. While ECI attempts to address the statutory meaning of the term, the Commission is not entirely convinced by its argument. If the General Assembly intended for nuclear waste to include low-level nuclear waste it could have so stated.

Likewise, the Commission is not convinced by ComEd's argument that the statute does not specify a separate line item for low-level waste. While the General Assembly did not specifically require a separate line item delineating low-level and high-level nuclear waste, Section 16-127(b) requires the Commission to establish the form of a standardized chart that provides, among other things, the amount of nuclear waste. In developing the form of the standardized chart, the Commission has the discretion to require separate line items for low-level and high-level nuclear waste. Contrary to ComEd's assertions, if the General Assembly intended the term "nuclear waste" to include only spent nuclear fuel it could have so stated. Instead, the General Assembly left it up to the Commission to determine the meaning of the term.

The Commission agrees that the production of low-level nuclear waste is not as directly related to the production of electricity as is high-level nuclear waste. However, Section 16-127 indicates that utilities and ARES must report the amount of nuclear waste attributable to the known sources of electricity, not the amount of nuclear waste directly attributable to each kilowatt-hour of electricity produced. As ECI witness Seidita stated, "[n]uclear plants make nuclear waste. That correlation is perfectly clear, and it is equally true of both high-level and low-level nuclear waste." (ECI Exhibit 3.0, p. 12). Furthermore, the Commission rejects the proposals that low-level and high-level nuclear waste be combined. Low-level nuclear and high-level nuclear waste are separate and distinct. Separate lines for low-level and high-level nuclear waste are appropriate, in part because the units typically used to measure low-level waste are different from the units typically used to measure high-level waste (ECI Exceptions, p. 8).

Based upon its review of the statute and the record in this proceeding, the Commission concludes that the General Assembly left to its discretion how to define nuclear waste. Section 16-127 is entitled “Environmental Disclosure” and is not limited to high-level nuclear waste nor to materials that end up in a waste facility, contrary to IP’s assertion. In fact, some of the emissions that will be disclosed under this rule (carbon dioxide, nitrogen oxides, and sulfur dioxide), will be released into the atmosphere. Nothing in Section 16-127 even implies that disclosure of emissions and nuclear waste should be limited to that which cannot be reprocessed or recycled. The Commission concludes that the General Assembly intended for utilities and ARES to disclose information regarding substances attributable to the production of electricity. Low-level nuclear waste would not be produced if not for the production of nuclear energy. There is no question about this relationship. Therefore, low-level nuclear waste is “attributable” to the production of nuclear energy. Or, as ComEd states, low-level nuclear waste is “tied to the production of electricity;” for this reason, ComEd’s reliance on the canon of *eiusdem generis* is misplaced.² Given the fact of this relationship, the Commission concludes that utilities and ARES should disclose information regarding both low-level and high-level nuclear waste. As a result, the Commission has included definitions of both “high-level nuclear waste” and “low-level nuclear waste” in this section. The definition of low-level nuclear waste used in Section 421.20 is the same used by IDNS at 32 Ill. Adm. Code 609. This definition was chosen because utilities and ARES operating in Illinois should already be familiar with it. The Commission is aware that the aforementioned reports made to IDNS are submitted on an annual basis and that Section 16-127 calls for quarterly submissions. The Commission concludes that any incremental burden associated with reporting this data quarterly is insignificant.

There was also some disagreement over the proper manner in which “unknown” resources should be reported. For example, ECI asserts that the Commission should require electric utilities to apportion “unknown” resources among the utilities’ known sources for purposes of the fuel source and pollution data. (ECI Initial Brief, p. 30). Staff argues that resources that are not known fit in well with its definition of “other resources.” (Staff Initial Brief, p. 11). Alternatively, ComEd proposes a category of “unknown resources purchased from other companies.” (ComEd Initial Brief, p. 13).

ECI argues that “[p]roviding generally accurate, though not 100% perfect information, is preferable to no environmental information from a large generic ‘unknown’ category.” (ECI Initial Brief, p. 31). In contrast, ComEd argues that ECI’s proposal does not constitute an estimation but, instead, substitutes data that will, in all likelihood, not be reflective of actual generation or emissions. (ComEd Initial Brief, pp. 10-11). However, ComEd also argues that, contrary to Staff’s proposal, unknown

² Regardless of the relationship between low-level nuclear waste and the production of electricity, ComEd’s “*eiusdem generis* argument” also falls short because ComEd fails to appreciate that canons of construction are not hard-and-fast rules, but are rather rules of thumb designed to aid an interpreter of a statute. In interpreting the term “nuclear waste” in Section 16-127, the Commission chooses not to confine the operations of the language in question.

amounts should not be added with “other resources.” Instead, ComEd suggests that its proposed category be used to recognize the fact that the source of purchased power may not always be discernible. (*Id.*, p. 13). Likewise, IP states that it does not object to the requirement that the total aggregate amount of electricity from unknown sources be disclosed. (IP Initial Brief, p. 2).

The Commission concludes that ECI failed to demonstrate that its proposed apportioning method will result in “generally accurate” information. Furthermore, the Commission concurs that, through the use of the term “to the maximum extent practicable” in Section 16-127, the General Assembly contemplated that certain resources would be unknown. In the interests of clarity, the Commission has included the term “unknown resources purchased from other companies” in addition to the term “other resources” in this section. Contrary to Staff’s position, the Commission concludes that unknown sources and other resources are entirely different. “Other resources” means those resources that are known, but are not explicitly identified in the other definitions. “Unknown resources” means those resources that are not known.

How the rule treats unknown sources of electricity is addressed further in the discussion of Section 421.30(a)(1) below.

C. Section 421.30 Disclosure Statements Provided to the Commission

Section 421.30 implements Section 16-127(e) of the Act, which requires that all of the information submitted with customer bills also be submitted to the Commission for inclusion in the Commission’s World Wide Web site (“Web site”). Subsections (a)(1),(2), and (3) specify the format in which the information must be submitted to the Commission. At no point in this proceeding did Staff or any of the intervenors argue that the Commission lacked the authority to specify the format of information submitted to the Commission. Requiring standardized submissions to the Commission is consistent with one of the apparent purposes of Section 16-127, that being to provide customers with clear and understandable information that will enable them to easily compare the energy and services provided by competing utilities and ARES. If all of the information provided to the Commission and displayed on the Commission’s Web site is in the same format, it will be far easier for consumers to make informed decisions. A standardized format for this information would also reduce the time and effort necessary to post the information on the Commission’s Web site resulting in more timely dissemination of the information and a smaller burden on the Commission’s resources.

Subsection (a)(1) addresses the table required under Section 16-127(a)(i). The only variation between the list of sources in the Act and the list of sources in the rule is that the rule also requires disclosure of “unknown sources purchased from other companies.” As discussed above, this last category was added in response to concerns that utilities and ARES that purchase power may not know how that power was generated. This is particularly true if power is bought and sold several times

before reaching a customer's home or business. Rather than exclude that power from the "source table" required by Section 16-127(a)(i), consumers should be informed that the source of a certain percentage of their electricity can not be determined due to the nature of the deregulated electric power industry.

Staff, and those intervenors that support Staff's rule, would have the unknown sources of power included under "other resources," and insist that this approach is logical and promotes clarity. (Staff Initial Brief, p. 11). This method, however, ignores the more logical and clearer interpretation of "other resources." As suggested by ComEd, "other resources" should be limited to sources of power that are not common enough to warrant their own category in the "source table," such as burned refuse, geothermal, landfill gas, tidal generation, etc. (ComEd Initial Brief, p. 13). To include unknown sources with known, but less common sources, distorts the accuracy of the "source table."

ECI, on the other hand, argued that a category of unknown power should not be allowed at all. ECI witness Mario Teisl testified that undesignated portions of the fuel mix could be used to hide "dirtier" fuel sources. (ECI Ex 1.0, p. 14). Instead, ECI suggests that truly "unknown" power be apportioned among the types of fuel sources from which a utility or ARES knows it generates power. (ECI Initial Brief, p. 30). ECI witness James Seidita explained how and why electricity suppliers should use published information on the resource mix in the region from which the "unknown" power was purchased to estimate the proportion of the "unknown" resources. (ECI Ex 3.0, p. 6-8). But as Staff witness Stutsman indicated during cross-examination, using the regional average from which power was purchased may not result in the best estimates of the "unknown" power's source. (TR 95-96). Mr. Stutsman testified that regional power grids are heavily interconnected and that there are heavy power flows across those interconnections. (*Id.*). Therefore, it would be very difficult, if not impossible, to determine from which region purchased power has actually come. Without knowing from which region purchased power has originated, a utility or ARES would not know upon which region's fuel mix to rely when attempting to estimate "unknown" power's source. ComEd witness DelGeorge added that ECI's suggestion deserves some consideration, but given the time constraints in developing this rule and the fact that there has been no thought given to the appropriate region upon which to rely, it would not be practical to implement ECI's suggestion at this time. (TR 189).

ECI attempted to counter this argument by relying on two orders of the Federal Energy Regulatory Commission ("FERC") approved after the record was marked heard and taken. In its Reply Brief, ECI asked the Hearing Examiner to take administrative notice of the orders in FERC Docket Nos. RM95-9-003 and RM98-3-000. According to ECI, FERC's decision should make it easier for utilities and ARES to determine the fuel mix and emissions characteristics of purchased power by requiring transmission providers to electronically post information regarding the location of generators providing electric power and where that power will be transmitted. Such information, ECI alleges, should make it easier to apportion purchased power. (ECI Reply Brief,

p. 22). At the time ECI made this request, neither order was available to the public. Relying on a FERC press release, the only information available at the time Briefs on Exceptions were due, Staff argued that because the FERC orders will not necessarily identify buyers and sellers using transmission lines, and would therefore not identify the end retail consumer of such power, ECI's request should be denied. (Staff Brief on Exceptions, pp. 1-2).

One business day prior to the date Replies to Briefs on Exceptions were due, FERC publicly released its order in Docket No. RM95-9-003. Administrative notice, however, is not taken of the Order in this FERC docket. Regardless of whether FERC's order in RM95-9-003 facilitates the apportionment of purchased power, the Commission finds that apportioning such power is inappropriate. Section 16-127 explicitly recognizes that the source of some power will be unknown. Furthermore, the Commission concludes that the potential harm resulting from misleading consumers is more significant than the potential "confusion" that consumers may incur from accurately reporting unknown sources of generation, which is the reason ECI seeks to avoid any "unknown" categories. The FERC order in RM95-9-003 fails to resolve the fundamental problem that ECI's apportioning proposal substitutes an inaccurate estimate for an accurate "unknown" quantity. ECI's motion for administrative notice is denied. Nor will administrative notice be taken of the other FERC order, RM98-3-000, since that order has not been made public as of the time this order is written.

This is not to say, however, that when a utility or ARES can not readily determine the source of the power that it is selling to an end-user that it may simply include that amount in the "unknown resources" category. Section 16-127 states that the required information shall be provided to the "maximum extent practicable." The Commission agrees with ECI's argument that this standard is beyond a good faith showing and requires a utility or ARES to be prepared to make a compelling showing that it is absolutely not practical to obtain and provide the information in question. (ECI Initial Brief, p. 13).

Subsection (a)(1)(A) requires percentages to be rounded to the nearest whole number in order to facilitate customer comprehension. Subsection (a)(1)(B) requires utilities and ARES to list, in the "source table," sources of electricity they do not use as "0%." In discussing disclosures that should and should not be made in consumers' bill inserts, Staff states that sources of energy not used by a utility or ARES need not be listed at all in the "source table." (Staff Initial Brief, p. 11). CILCO supports Staff's view. (CILCO Reply Brief, p. 3). ECI argues, however, that reporting which sources of energy are not being utilized provides valuable information because consumers can see what other sources of energy are potentially available. (ECI Initial Brief, p. 29). ComEd also supports the requirement that "0%" be listed for those sources not used by a utility or ARES. (ComEd Initial Brief, p. 13). The Commission agrees with ECI and ComEd and notes that listing power sources not used as "0%" is also more in line with one purpose of Section 16-127, that being to facilitate a consumer's decision making process, discussed earlier in this section. Subsection (a)(1)(C) requires utilities and

ARES to use the format depicted in Exhibit A for the “source table” in recognition of that purpose as well.

Subsection (a)(2) concerns the pie-chart required by Section 16-127(a)(ii). Subsection (a)(2)(A) indicates that energy sources not used by a utility or ARES shall not be depicted in the pie-chart. The same respective arguments by ECI, Staff, and CILCO for and against showing “0%” on the “source table” were also made with regard to the pie-chart. (ECI Initial Brief, p. 29; Staff Initial Brief, p. 12; CILCO Reply Brief, p. 3). ComEd opposed the use of “0%” in the pie-chart, asserting that it would clutter the chart and might confuse customers. (ComEd Initial Brief, p. 13). The Commission agrees with Staff, CILCO, and ComEd with regard to the pie-chart, and finds that including “0%” in the pie chart would most likely confuse consumers. The very purpose of a pie-chart is to visually represent the proportionate relationship of certain quantities in existence. To attempt to label and show a resource’s nonexistence in a pie-chart conflicts with this purpose. The fact that a particular source of energy is not depicted in the pie-chart is sufficient to show that it does not exist. Furthermore, consumers will be able to see in the “source table” that certain potential sources of energy have not been used due to the fact that “0%” has been listed. Subsection (a)(2)(B) designates certain colors for each source of energy in the pie-chart submitted to the Commission. ECI initially suggested the use of colors, claiming that such uniformity will aid consumers in comparing pie-charts. (ECI Initial Briefs, p. 8). The Commission adopts the use of colors for this reason and for the purpose of reducing the time and effort necessary to prepare the pie-charts for posting on the Commission’s Web site, as discussed above. The colors suggested by ECI for each source of power are acceptable to the Commission. The only category not addressed by ECI is “unknown resources purchased from other companies;” which should be depicted with the color purple. Subsection (a)(2)(C) requires utilities and ARES to use the format depicted in Exhibit B for the pie-chart for the purpose of providing standardized data to the Commission.

Subsection (a)(3) regards the “emissions table” required by Section 16-127(b). As discussed above, the Commission deems it appropriate to require reporting of low-level nuclear waste, thus the table contains categories for both high-level and low-level nuclear waste as well as carbon dioxide, nitrogen oxides, and sulfur dioxide. There was some disagreement concerning the use of pounds as the weight unit for non-nuclear emissions. When used in conjunction with kilowatt-hours, ECI is concerned that use of pounds will result in a number that is too small to be meaningful to customers. (ECI Exceptions, p. 32). Instead, ECI recommends using grams or milligrams (ld.); which, incidentally, ECI argued against at an earlier point in this proceeding on the basis that most consumers are not familiar with such metric units. (ECI Ex. 1.0, p. 8) Staff, on the other hand, suggests that pounds be used for the same reason that ECI earlier opposed the use of metric units. The Commission adopts the use of pounds for use in disclosing non-nuclear emissions in subsection (a)(3)(A). The Commission finds that in all likelihood, consumers in Illinois are more familiar with the English pound than the metric gram or milligram. Staff also recommended the use of ounces for measuring high-level nuclear waste. Since, however, nothing on the record

indicates why ounces should be preferred over pounds when measuring high-level nuclear waste, the Commission will use pounds in subsection (a)(3)(B) for the sake of consistency. Cubic feet was chosen as the measurement unit for low-level nuclear waste in subsection (a)(3)(C) because it is the unit currently used by the IDNS. Nothing in the rules should be construed as prohibiting generators of low-level nuclear waste from compacting such waste before disclosing its volume.

Electricity is reported on the basis of 1,000 kilowatt-hours. ECI and the City of Chicago are the only intervenors opposed to use of kilowatt-hour and instead urged the use of megawatt-hour. (ECI Initial Brief, pp. 25-27; City of Chicago Initial Brief, pp. 5-6). They argue that using kilowatt-hours produces numbers that are too small to be meaningful to customers. (*Id.*). Because the numbers may be less than .000, ECI and the City are also concerned that a utility or ARES may mislead customers by displaying their emissions or waste to only three decimal places, which may result in the appearance that a particular type of emission or waste is not produced at all. (*Id.*). The assertion by ECI and the City that customers are familiar with the term megawatt-hour is not supported by the record. Nor is there any support in the record for the alternative suggestion of PG&E's witness Bray that emissions be calculated on a pounds per month basis for residential customers. (PG&E Ex. 1.0, p. 10). ECI supports this alternative (ECI Initial Brief, p. 26), but there is no evidence that this measurement would be more meaningful to customers than kilowatt-hours. On the other hand, there is some value to ECI and the City of Chicago's concerns that the numbers produced on a per kilowatt-hour basis may be too small to be meaningful to consumers. In contrast, Staff and the other intervenors support the use of kilowatt-hours, arguing that because customers are billed per kilowatt-hour usage, they are more familiar with kilowatt-hours. (Staff Initial Brief, p. 33). (See also CILCO Reply Brief, p. 3; PG&E Ex. 1.0, p. 9-10; ComEd Initial Brief, p. 12). The Commission also finds merit in Staff's position on this point and believes that consumer understanding is better served by use of kilowatt, rather than megawatt, -hours in this context. Because both positions have merit, the Commission adopts "1,000 kilowatt-hours" as the basis on which emissions and nuclear waste are to be disclosed. Although none of those participating in the rulemaking suggested the use of "1,000 kilowatt-hours" as the denominator, the Commission finds it to be a reasonable compromise between the two positions advanced on this issue.

The Commission notes, however, that even with the use of a 1,000 kilowatt-hour denominator, there still may be some potential to mislead consumers by manipulating decimal places. (ECI Initial Brief, p. 26; City of Chicago Initial Brief, p. 6). The category of greatest concern is high-level nuclear waste. In order to protect from such deception, subsection (a)(3)(D) has been incorporated into the rule. The specified significant digits are based on the 1996 statewide numbers for emissions and nuclear waste in Illinois, as shown in Staff's rebuttal testimony. (Staff Ex. 2.0, p. 15).

Subsection (a)(3)(E) requires a footnote indicating the percentage of power supplied for which the utility or ARES does not know the amount of emissions and

nuclear waste because the source of that power is unknown. Subsection (a)(3)(F) requires utilities and ARES to use the format depicted in Exhibit C for the “emissions table.”

Staff and ComEd also proposed including a footnote to the “emissions table” that identified the five largest suppliers of electrical power for which the utility or ARES does not know the emissions or nuclear waste. (Staff Initial Brief, p. 14; ComEd Ex. 1, p. 8). IP, AmerenUE/CIPS, and PG&E all opposed the inclusion of such a footnote on the grounds that such information was confidential and disclosing it could be competitively harmful. (IP Initial Brief, p. 2; AmerenUE/CIPS Initial Brief, p. 3; PG&E Initial Brief, p. 4). Although utilities and ARES may consider such information proprietary and confidential, the Commission opts not to include such a provision for a different reason. The Commission is of the opinion that providing this additional information would do little to enhance consumer understanding and decision making.

Section 421.30(b) sets forth the time frame for providing the required information to the Commission. All of the intervenors and Staff agreed that providing data quarterly for the previous twelve-month period would provide consumers the most useful information. Providing data for only one three-month period would not take into account seasonal fluctuations in energy use and the eighteen-month refueling cycle of nuclear reactors. At the end of each quarter, utilities and ARES will have three months to report the information to the Commission. According to ComEd witness DelGeorge, roughly ninety days are necessary to collect the information once the quarter ends, tabulate the data, design the inserts, and have the inserts printed. (ComEd Ex. 1, p. 4).

The purpose of subsection 421.30(b)(2) is to take note of the fact that electric suppliers already collect the information required by Section 16-127 for other purposes (ComEd Exceptions, p. 11); therefore, utilities, for the most part, should have no problem providing the information for the twelve-month period preceeding 1999. This section also recognizes the fact that ARES will only be providing electricity to Illinois consumers during the last three months of 1999, pursuant to Section 16-104(a)(1) of the Act. If for any reason a utility or ARES does not have twelve months of data for the period preceeding 1999, it should clearly state the period on which the disclosure is based.

Section 421.30(c) concerns the form in which the required information must be submitted. The only potential issue of contention is the requirement that the information be submitted in a clearly legible 12 point font size. ECI urged standardization of the font size, arguing that it would assist consumers in comparing different companies’ disclosures. (ECI Initial Brief, p. 24). Some objected to such standardization of information submitted to consumers. (Staff Ex. 2.0, p. 7; IP Exhibit 1.2, p. 2; CILCO Initial Brief, p. 3). Given that the parties generally conceded the Commission has authority to specify standardization of the submissions to the Commission, we impose the requirement of a 12 point font size as well. Having all of the information filed with the Commission in the same font size will reduce the time and

effort necessary to post the information on the Commission's web site, as discussed above.

D. Section 421.40 Customer Billing Disclosure Statements

Section 421.40 governs the environmental disclosures that utilities and ARES must make in customers' bills at least once each quarter. The provisions in Section 421.40 are similar, if not identical, to provisions in Section 421.30. Rather than repeat the discussion and analysis of such similar or identical provisions, references to the discussion and analysis of Section 421.30 are made when appropriate.

The proper scope of "nuclear waste" was one of the two most contested issues in this proceeding. The second issue concerned the standardization of the "source table" and pie-chart required under Section 16-127(a). ECI and the City of Chicago steadfastly argued that the Commission should dictate the format of the "source table" and pie-chart that consumers receive. (ECI Initial Brief, pp. 15-17; City of Chicago Initial Brief, pp. 4-5). Both believe that Section 16-127 in no way precludes the Commission from standardizing the "source table" and pie-chart and that it defies common sense to establish the format for the "emissions table" but not the "source table" and pie-chart. (*Id.*). If one of the goals of Section 16-127 is to enhance customer knowledge and understanding, ECI and the City assert that standardization would only further that goal. (*Id.*). In their Initial Briefs, ECI and the City point to the following language in the Commission order initiating this docket to support their position:

Given this legislative mandate, it is appropriate for the Commission to initiate a rulemaking proceeding to develop the rules that will provide a standardized chart as contemplated by Section 16-127(b) and also develop rules for the format for the presentation of the information required by subsections (a) and (b) so that the Commission will be able to effectively implement subsection (e).

In addition, ECI and the City of Chicago argue that the Commission has the authority to standardize all disclosures to consumers by virtue of its broad authority in Section 10-101 of the Act. (ECI Exceptions, p. 22; City of Chicago Exceptions, p. 2). The relevant portions of Section 10-101 reads as follows:

To the extent consistent with this Section and the Illinois Administrative Procedure Act, the Commission may adopt reasonable and proper rules and regulations relative to the exercise of its powers, and proper rules to govern its proceedings, and regulate the mode and manner of all investigations and hearings, and alter and amend the same.

The City of Chicago also cites three rules adopted by the Commission pursuant to this general authority that were not specifically required by the Act. (City of Chicago Exceptions, p. 2).

ECI also relies heavily on the testimony of its witness Teisl, who testified that consumers favor uniform and clearly understandable disclosure statements and are more apt to participate in the competitive market when they have such understandable information. (ECI Ex. 1.0, p. 8). In standardizing both tables and the pie-chart, ECI would have the Commission 1) specify the size, type, and font used, 2) designate colors for each power source on the pie-chart, 3) require that the disclosure statements be placed on a separate 6" x 9" insert, 4) prohibit other information from being placed with the environmental information, and 5) briefly describe the detriment to the environment caused by each of the emissions and nuclear waste listed in the "emissions table." (ECI Initial Brief, pp. 8-10).

Staff, however, argues that it is not necessary to prescribe the details sought by ECI and perceives ECI's suggestions as attempts to micromanage utilities and ARES. (Staff Ex. 2.0, p. 7). Common sense should prevail, according to Staff, when the utilities and ARES create the "source table" and pie-chart. (*Id.*). Other intervenors, such as IP and CILCO, claim that standardizing the "source table" and pie-chart is beyond the scope of the Commission's authority. (IP Initial Brief, p. 2; CILCO Initial Brief, p. 3).

The Commission concurs with ECI's assessment of our authority. Section 16-127 does not preclude the Commission from adopting a rule that specifies a standardized tabular chart and pie-chart for the fuel source information disclosure. The General Assembly mandated that the Commission establish the format of the "emissions table" in Section 16-127(b). The fact that the General Assembly did not mandate that the Commission standardize the format of the "source table" and pie-chart provided to customers does not mean that the Commission lacks the authority to do so. Moreover, the Commission has broad authority under Section 10-101 to "adopt reasonable and proper rules and regulations relative to the exercise of its powers . . ." Business and Professional People for the Public Interest v. Illinois Commerce Commission, 136 Ill. 2d 192, 203 (1989).

The Commission finds that standardization of the Section 16-127 environmental disclosure requirements is desirable in order to enhance consumer understanding, avoid confusion and frustration, and enable consumers to comparison shop. Such standardization should specify both the content and the appearance of the "emissions table," the "source table" and pie chart. As for ECI's suggestions regarding the "emissions table," however, the Commission agrees with Staff that identifying the environmental detriments of the emissions and nuclear waste is beyond the Commission's expertise. (Staff Initial Brief, p. 33).

As for the specifics of Section 421.40, subsection (a)(1) and (2) identify the requirements in Section 16-127(a). The discussion of Section 421.30(a)(1) and (2) above applies similarly to these subsections.

Subsection (a)(3) describes the format of the “emissions table.” Sections 421.40 (a)(3)(A), (B), (C), (D), (E), and (G) are similar to Sections 421.30(a)(3)(A), (B), (C), (D), (E), and (F), respectively. The discussion and analysis of those provisions under Section 421.30(a)(3) apply equally to the corresponding provisions under Section 421.40(a)(3). Section 421.40(a)(3)(F) contains the only language with no counterpart under Section 421.30. Subsection (a)(3)(F) requires utilities and ARES to note that additional information regarding companies selling power in Illinois may be found on the Commission’s Web site. ECI initially suggested such a requirement (ECI Ex. 1.0, p. 17), which Staff incorporated into its proposed rule (Staff Initial Brief, p. 16). One purpose of this requirement is to enable consumers to find the information necessary to make an intelligent choice among competing power suppliers. Another purpose is to enhance the credibility of the information by linking it to the official Web site of a regulatory body. During cross-examination, none of the utilities or ARES opposed such a requirement.

Section 421.40(a)(4) concerns the separation of information required by Section 16-127 from other information provided by a utility or ARES to its customer. ECI recommends the use of a separate disclosure insert or, in the alternative, a box surrounding the disclosure information. (ECI Initial Brief, pp. 23-24). ECI asserts that the disclosure insert is preferable to the box, because the information is more clearly separated. (Id.). Furthermore, ECI asserts that the separation of information informs customers that the required disclosures are part of a regulatory mechanism rather than marketing information provided by the electricity suppliers. (Id.). ECI argues that consumers consider regulated information mechanisms to be more credible than marketing information. (Id.)

CILCO asserts that the some of ECI’s proposed requirements are beyond the Commission’s authority and impose significant costs on electricity suppliers. For example, CILCO asserts that the additional paper needed for separate inserts could contribute to bills that exceed the weight limits for the lowest postage rates. (CILCO Initial Brief, p. 3). CILCO also asserts that regulation of the color, size and location of the environmental disclosure in customer bills can not significantly aid consumers in comparing alternatives because the bill contains only one company’s information. (Id., p. 4).

The Commission finds ECI’s proposal that utilities and ARES use a separate disclosure insert or, in the alternative, a box surrounding the disclosure information to be reasonable. Section 16-127(c) provides that electric utilities and ARES, in addition to the information required by Sections 16-127(a) and (b), may provide any other information that they believe is relevant. The Commission concludes that the General Assembly intended for any such supplemental information to be separate and distinct

from the required information. To ensure this is clear to consumers, the Commission has adopted the ECI proposal to use a separate insert disclosure as the preferred approach to maximize clarity and consumer understanding, as ECI witness Teisl testified. The Commission has adopted ECI's preferred approach in light of the fact that Section 16-127 does not require a comparison of costs and benefits by the Commission and, even if such a comparison were required, no quantitative evidence was presented which would suggest a separate insert requirement would impose significant costs on utilities and ARES.

Section 421.40(a)(6) is designed to address Mt. Carmel's concerns. Mt. Carmel asserts that due to its small size, it should not be required to provide "reporting that is unnecessary, burdensome, or beyond the scope of the statute." (Mt. Carmel Initial Brief, p. 1). Mt. Carmel states that it provides postcard billing to its customers and that the cost of providing bill inserts would be burdensome. (Mt. Carmel Exhibit 1.0, pp. 3-4). Mt. Carmel suggested that all electric utilities and ARES that are exempt from the billing requirements of 83 Ill. Adm. Code 410.350 as of January 1, 1998 should also be exempt from all requirements of Section 16-127 of the Act. (*Id.*, Attachment C). Mt. Carmel also states that it could provide a separate postcard disclosure each quarter with the minimum statutory requirements. Mt. Carmel asserts it could not include color printing, standardized size and location of the displays, or graphical elements. (Mt. Carmel Initial Brief, p. 2).

ECI asserts that where the General Assembly intended to exempt smaller utilities from certain obligations, it has done so explicitly. ECI argues that exempting any utility or ARES from providing the disclosure information required by Section 16-127 violates the statute. (ECI Initial Brief, pp. 11-12). At the least, ECI believes that Mt. Carmel should be required to send to its customers an additional postcard containing the disclosure statement. (*Id.*)

Staff indicates it believes waiver provisions, such as those requested by Mt. Carmel, are not necessary in the rule. Staff asserts that because Section 16-127 provides that utilities and ARES shall provide the information only to the maximum extent practicable, the flexibility in the Act eliminates the need for a waiver in this rule. (Staff Initial Brief, p. 38).

The Commission rejects Mt. Carmel's proposal that all electric utilities and ARES that are exempt from the billing requirements of 83 Ill. Adm. Code 410.350 as of January 1, 1998 should also be exempt from all requirements of Section 16-127 of the Act. The Commission agrees with ECI that Section 16-127 applies to all utilities and ARES that provide power and there is no statutory provision for exemptions. Furthermore, the Commission's order which exempted Mt. Carmel from the billing requirements of 83 Ill. Adm. Code 410.350 indicates that Mt. Carmel already "substantially compl[ies] with the rule." (Commission Order, Docket No. 88-0009, November 22, 1988, p. 3) In contrast, Mt. Carmel's proposal in this proceeding, which

would completely exempt Mt. Carmel from the requirements of Section 16-127, is contrary to the law.

The Commission also rejects Staff's interpretation that utilities and ARES can be exempt under the "to the maximum extent practicable" language. This interpretation would allow any utility or ARES to ignore the requirements of Section 16-127 by simply claiming it is too costly to comply. As a result, the Commission has adopted Section 421.40(a)(6) which allows any utility or ARES that was using postcard billing on January 1, 1998 to provide the disclosure information to customers through an additional postcard, as long as that utility or ARES continues to use postcard billing. This provision properly fulfills the disclosure requirements of the statute without unduly burdening a company currently providing postcard billing to its customers.

Section 421.40(a)(8) specify the minimum size of the print on the separate billing inserts (12 point) and the minimum size of the billing insert (6"x9"), as recommended by ECI. Such requirements will ensure that disclosure statements are legible.

Section 421.40(b) sets forth the time frame for providing the required information to customers. The discussion of Section 421.30(b) applies to this section as well.

IV. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) the Commission has jurisdiction over the parties and the subject matter of this proceeding;
- (2) the recitals of fact and conclusions reached in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;
- (3) 83 Ill. Adm. Code 421, "Environmental Disclosure," as shown in the attached Appendix, should be submitted to the Secretary of State for publication in the Illinois Register, thereby initiating the first notice period under Section 5-40 of the Illinois Administrative Procedure Act, 5 ILCS 100/1-1 et seq.;
- (4) all objections and motions which remain unresolved should be considered resolved in a manner consistent with the ultimate conclusions contained in this Order.

IT IS THEREFORE ORDERED that the Notice of Proposed Rules for 83 Ill. Adm. Code 421, "Environmental Disclosure," as shown in the attached Appendix, shall be submitted to the Secretary of State for publication in the Illinois Register, thereby initiating the first notice period required by Section 5-40 of the Illinois Administrative

Procedure Act, and that all other submissions necessary for compliance with the Illinois Administrative Procedure Act be made.

IT IS FURTHER ORDERED that all objections and motions which remain unresolved shall be considered resolved in a manner consistent with the ultimate conclusions contained in this Order.

IT IS FURTHER ORDERED that this order is not final and is not subject to the Administrative Review Law.

By order of the Commission this 22nd day of July, 1998.

(SIGNED) RICHARD L. MATHIAS

Chairman

(S E A L)